

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE

LOCAL 971/550 NATIONAL SECURITY  
OFFICERS BENEVOLENT ASSOCIATION  
(THE BROOKLYN HOSPITAL CENTER)

and

Case No. 29-CB-14283

RICHARD NATTY, An Individual

LOCAL 971/550 NATIONAL SECURITY  
OFFICERS BENEVOLENT ASSOCIATION  
(THE BROOKLYN HOSPITAL CENTER)

and

Case No. 29-CB-14284

DENTON STERLING, An Individual

*Michael Berger, Esq., for the General Counsel*  
*Bryan C. McCarthy, Esq. (O'Connor & Mangan, P.C.),*  
*of New Rochelle, New York, for the Respondent*

DECISION

Statement of the Case

**ELEANOR MACDONALD, Administrative Law Judge:** The hearing in this case took place in Brooklyn, New York, on June 29, 2010. The Consolidated Complaint alleges that Respondent, in violation of Section 8(b)(1)(A) of the Act, refused to process grievances to arbitration on behalf of Richard Natty and Denton Sterling. Counsel for the General Counsel seeks a default judgment.

Request for Default Judgment

On May 13, 2010, the Acting Regional Director for Region 29 issued the Consolidated Complaint and Notice of Hearing in the instant case setting a hearing date of June 29, 2010. The Complaint was mailed on May 13, 2010 by Certified Mail to Respondent Local 971/550 and by Regular Mail to O'Connor and Mangan, P.C. The signed Return Receipt for delivery to Respondent shows that Respondent acknowledged receipt of the Complaint on May 17, 2010.

The Consolidated Complaint sets forth the requirements for filing an answer. The Complaint puts Respondent on notice that pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations the Answer "must be **received by this office on or before May 27, 2010, or postmarked on or before May 26, 2010.**" (emphasis in original) The Consolidated Complaint instructs Respondent that the Answer may be filed electronically by using the E-filing system and sets forth the method for such filing. The Consolidated Complaint

provides that "Service of the answer on each of the other parties must be accomplished in conformance with the requirements of Section 102.114 of the Board's Rules and Regulations."

The Consolidated Complaint further states that, "The answer may not be filed by facsimile transmission. If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to Motion for Default Judgment, that the allegations in the Consolidated Complaint are true." (emphasis in original)

On May 27, 2010, Michael Berger, Esq., of Region 29 wrote to Respondent's Counsel, Bryan C. McCarthy, Esq., reminding him that the Consolidated Complaint was served on May 13 and that the answer was due on May 27, 2010. The letter of May 27 stated, "Unless an answer is received by the close of business on June 3, 2010, the Region will seek a Default Judgment from the Board on the allegations in the Consolidated Complaint."<sup>1</sup>

Respondent Local 971/550, by its attorneys O'Connor and Mangan, P.C., submitted an Answer dated June 8, 2010. The Answer was signed by Bryan C. McCarthy, Esq.

At the instant hearing, Counsel for the General Counsel moved for a default judgment based on three grounds. First, the Answer was untimely, having been received at the Region by regular mail on June 9, 2010. Second, the Answer was initially served untimely by facsimile on June 8. Third, the Answer was never served on the Charging Parties Richard Natty and Denton Sterling. Counsel for the General Counsel urged that the Answer should be rejected as untimely and a default judgment should be granted.

At the hearing, Counsel for Respondent opposed the granting of a default judgment. Counsel urged that the untimely Answer should be accepted under Section 102.111(c) of the Rules and Regulations on the basis of good cause and lack of prejudice. Counsel for Respondent stated that he had instructed his clients to find other counsel for the hearing because he was named as an agent in the Complaint and would be expected to testify. Counsel for Respondent stated that the Union could not find another lawyer because of its limited resources. Counsel for Respondent stated that he had informed his clients of the extension of time granted by the Region. After the extension expired the Union representatives asked Counsel to file an Answer and he did so. Counsel for Respondent stated that he had arranged for the Charging Parties to be served with the Answer but that they had not been served due to "law office failure." Counsel for Respondent argued that no prejudice arose from the late filed Answer.

Counsel for the General Counsel countered Respondent's argument by pointing out that the charges in the instant case were filed in February 2010 and at that time Counsel for Respondent became aware that he might be a witness in the case; thus, Respondent and its Counsel had ample time to find another attorney.

Section 102.111(c) of the Rules and Regulations provides

The following documents may be filed within a reasonable time after the time prescribed by these rules only upon good cause shown based on excusable neglect and when no undue prejudice would result:  
(1) In unfair labor practice proceedings, motions, exceptions, answers to a complaint or

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<sup>1</sup> The extension of time to June 3, 2010 was granted as a courtesy by the Region even though Respondent had made no request for such an extension.

a backpay specification, and briefs; and

(2) In representation proceedings, exceptions, requests for review, motions, briefs, and any responses to any of these documents. A party seeking to file such documents beyond the time prescribed by these rules shall file, along with the document, a motion that states the grounds relied on for requesting permission to file untimely. The specific facts relied on to support the motion shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts.

Respondent did not file the required Motion accompanied by a sworn affidavit requesting permission to file its untimely Answer. Thus, Respondent did not satisfy the rule relied on by its Counsel in opposing Counsel for the General Counsel's Motion for a default judgment. In particular, there is no sworn statement setting forth any efforts by Respondent to obtain other attorneys or the reasons for the purported lack of success in finding alternate representation. There is no sworn statement showing why Respondent waited until after the Answer was due to ask Attorney McCarthy to file an Answer. Respondent's opposition to the Motion for default judgment fails on this ground. *Agencia de Publicaciones de Puerto Rico, Inc.*, 353 NLRB No. 68 (2008).

I find that Respondent has not shown good cause based on excusable neglect for its failure to file a timely Answer. Respondent, through its Counsel, was aware in February 2010 that a Complaint might issue and that its Counsel might be a witness at the hearing. The Complaint dated May 13 did not come as a surprise to Respondent or its Counsel and ample time had elapsed during which Respondent could have obtained other Counsel. It is clear that once the Complaint issued Respondent was on notice that the Answer was due on May 27 and it is clear that Respondent was warned that an extension of time had been granted to June 3. No reason has been shown to explain why Respondent waited until after June 3 to ask Mr. McCarthy to file the Answer; the request could just as easily have been made before June 3 and a timely Answer could have been filed. Respondent's opposition to the Motion for default judgment fails on this further ground.

In the absence of good cause being shown for the failure to file a timely answer, I grant Counsel for the General Counsel's Motion for default judgment. On the entire record, I make the following

## **Findings of Fact**

### **I. Jurisdiction**

At all material times, The Brooklyn Hospital Center, a domestic corporation with an office and principal place of business located at 121 DeKalb Avenue, Brooklyn, New York, has been engaged in the operation of a hospital. Annually, The Brooklyn Hospital Center receives gross annual revenues in excess of \$250,000 and purchases and receives at the Hospital, goods and materials valued in excess of \$5,000 directly from suppliers located outside the State of New York. I find that The Brooklyn Hospital Center is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that Respondent Local 971/550 National Security Officers Benevolent Association is a labor organization within the meaning of Section 2(5) of the Act.

## II. Alleged Unfair Labor Practices

### Findings of Fact

1. At all material times, the following individuals have occupied the positions set forth opposite their names, and have been agents of Respondent, acting on its behalf:

Bryan C. McCarthy  
Gilberto Mendoza

Respondent's Attorney  
Business Representative

2. At all material times, by virtue of Section 9(a) of the Act, Respondent has been recognized as the exclusive collective-bargaining representative of the following employees, herein called the Unit, for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

All full time, regular part-time security guards and sergeants employed by the Hospital at the following locations: 121 DeKalb Avenue Brooklyn, New York; and 10 St. Paul Place, Brooklyn, New York, excluding all lieutenants, office clerical employees and supervisors as defined in the Act.

3. At all material times, Respondent and the Employer have maintained and enforced collective bargaining agreements, including an agreement effective by its terms from July 1, 2007 through June 30 2011, covering employment conditions of the Unit and containing, among other provisions, a grievance and arbitration procedure.

4. On or about February 10, 2009, Respondent, by its attorney and Mendoza, informed the individuals named below that it would process to arbitration their grievances concerning their discharges:

Richard Natty  
Denton Sterling

5. On or about the following dates, Respondent, by Mendoza informed Natty and Sterling that it was still waiting for an arbitration date and/or that their grievances were still being processed:

July or August 2009  
November 2009  
January 2010

6. Since on or about February 10, 2009 Respondent has refused to process to arbitration grievances filed under the provisions of the collective-bargaining agreement described above concerning the discharges of Natty and Sterling.

7. Respondent engaged in the conduct described above in paragraphs 4 through 6 by processing the grievances of Natty and Sterling in a perfunctory and arbitrary manner, essentially abandoning the grievances despite assuring Natty and Sterling that the grievances were being processed.

8. By engaging in the conduct set forth in paragraphs 4 through 7 in connection with its representative status as described above in paragraphs 2 and 3, Respondent has failed to

represent Natty and Sterling for reasons that are unfair, arbitrary, invidious, and has breached the fiduciary duty it owes to the employees it represents.

### Conclusions of Law

1. By refusing to process to arbitration the grievances of Richard Natty and Denton Sterling, by abandoning the grievances despite assuring Natty and Sterling that the grievances were being processed, by failing to represent Natty and Sterling for reasons that are unfair, arbitrary and invidious and by breaching the fiduciary duty Respondent owes to the employees it represents, Respondent has been restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act.

2. The unfair labor practices of Respondent, described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

### Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel seeks, as part of the remedy for the unfair labor practices, an order requiring that Respondent promptly request that the Employer reinstate the Charging Parties. If the Employer refuses to reinstate the Charging Parties, in the event the grievances have merit, the General Counsel seeks an order requiring Respondent to request processing of the grievances and requiring Respondent to pursue the grievances. In the event that the Respondent is unable to pursue the grievances to arbitration the General Counsel seeks a make whole order. Whether a make whole order should issue is a matter that may be litigated in compliance proceedings pursuant to the rule in *Iron Workers Local 377 (Alamillo Steel Corp.)*, 326 NLRB 375 (1998). That decision also holds that the Union is liable only for the increase in damages to the potential grievants caused by its failure to process their grievances to arbitration.

If any compliance proceeding results in a make whole order, losses shall be computed as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The General Counsel seeks an order requiring that Respondent, in addition to any standard notice-posting remedy ordered, post any notice to employees and members via its internet, e-mail, or other electronic procedures. The General Counsel has not shown that Respondent customarily communicates with its members electronically. I shall deny this requested remedy. *Nordstrom, Inc.*, 347 NLRB 294 (2006).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

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<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

**ORDER**

The Respondent, Local 971/550 National Security Officers Benevolent Association, 271 North Avenue, New Rochelle, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Arbitrarily, discriminatorily or in bad faith refusing, on request, to process grievances sought to be processed by employees towards whom it owes a duty of fair representation.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Promptly request that the Employer reinstate the Charging Parties to their former positions or, if the positions no longer exist, to substantially equivalent positions; and if the Employer refuses the request, promptly initiate and pursue in good faith and with due diligence grievance-arbitration on behalf of Richard Natty and Denton Sterling seeking the same relief under the 2007-2011 collective-bargaining agreement.

(b) Permit Natty and Sterling to be represented by their own counsel at the grievance-arbitration proceedings, and pay the reasonable legal fees of such counsel.

(c) In the event that it is not possible for the Respondent to pursue to arbitration on Natty's and Sterling's behalf the grievances that they sought to arbitrate concerning their discharges for any procedural or substantive reason resulting in an inability to resolve the grievances on the merits, and if the General Counsel shows in compliance that timely pursued grievances on the discharges would have been successful, make Natty and Sterling whole for any increase in damages they suffered as a result of Respondent's refusal to process their grievances to arbitration, with interest.

(d) Within 14 days after service by the Region, post at its union office in New Rochelle, New York, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by The Brooklyn Hospital Center, if willing, at all places where notices to employees are customarily posted.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn

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<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

**Dated, Washington, D.C., July 23, 2010.**

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**Eleanor MacDonald**  
**Administrative Law Judge**

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APPENDIX

NOTICE TO MEMBERS

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain on your behalf with your employer  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT arbitrarily, discriminatorily or in bad faith refuse, on request, to process grievances sought to be processed by employees to whom we owe a duty of fair representation.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL promptly request that The Brooklyn Hospital Center reinstate Richard Natty and Denton Sterling to their former positions or, if the positions, no longer exist, to substantially equivalent positions; and if the Employer refuses the request, promptly initiate and pursue in good faith and with due diligence grievance-arbitration on behalf of Natty and Sterling, seeking their reinstatement.

WE WILL permit Natty and Sterling to be represented by their own counsel at the grievance-arbitration proceedings, and pay the reasonable legal fees of such counsel.

WE WILL, if it is not possible for the Union to pursue the grievances, and if the General Counsel of the National labor Relations board shows in compliance proceedings that a timely pursued grievance on the issue of their discharges would have been successful, make Natty and Sterling whole for any increases in damages they suffered as a consequence of our refusal to process their grievances, with interest.

Local 971/550 National Security Officers Benevolent Association

(Union)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

Two MetroTech Center (North), Jay Street and Myrtle Avenue, Suite 5100

Brooklyn, New York 11201-4201

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.